STATE OF WISCONSIN

IN SUPREME COURT

Case No. 2020AP1488-OA

HOWIE HAWKINS and ANGELA WALKER,

Petitioners,

v.

WISCONSIN ELECTIONS COMMISSION, ANN S. JACOBS in her official capacity as Chair of the Wisconsin Elections Commission, MARK L. THOMSEN in his official capacity as Vice-Chair of the Wisconsin Elections Commission, MARGE BOSTELMANN in her official capacity as Secretary of the Wisconsin Elections Commission, JULIE M. GLANCEY in her official capacity as a Commissioner on the Wisconsin Elections Commission, DEAN KNUDSON in his official capacity as a Commissioner on the Wisconsin Elections Commission, ROBERT F. SPINDELL, JR. in his official capacity as a Commissioner on the Wisconsin Elections Commission, and ALLEN ARNTSEN,

Respondents.

WISCONSIN ELECTION COMMISSION'S RESPONSE TO PETITION FOR AN ORIGINAL ACTION AND MOTION FOR A TEMPORARY INJUNCTION

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INTRODUCTION

Petitioners' tardy request to be placed on the 2020 general election ballot should be denied because it has no merit and, if granted, would throw Wisconsin's careful preparations for the general election into chaos—an election process that has already begun and continues as we speak.

On August 20, 2020, the Wisconsin Elections Commission (the "Commission") declined to grant general election ballot access to Petitioners, the Green Party candidates for President and Vice President, due to undisputed defects on their nomination papers. Relying on that decision, counties and municipalities across Wisconsin have begun printing and mailing ballots to voters. Local elections officials cannot delay their preparations. They must meet looming statutory deadlines to mail ballots: under state law, by September 17 to all absentee voters residing in Wisconsin, and under federal law, by September 19 to all eligible military and overseas voters. And local election officials must meet those deadlines for the record numbers of voters who have requested to vote absentee in the general election.

Inexplicably, Petitioners waited *two entire weeks* after the Commission's August 20 decision to file this petition for an original action and "emergency" request for temporary injunctive relief. Petitioners' own delay created the purported "emergency" they now face. At this late hour, they ask this Court to order the reprinting of *every single ballot statewide* and thus the mailing of a *second* round of ballots to voters who have already received one. Not only would such an order impose new, unplanned expenses and require massive efforts by thousands of local election officials in all 72 counties and 1,850 municipalities—perhaps more importantly, it would cause statewide confusion and disorder for Wisconsin voters.

Because of Petitioners' own unreasonable delay, there is no practical way to grant them relief now without threatening the integrity of Wisconsin's electoral process. The petition and temporary injunction request should be denied.

Aside from the practical impossibility of relief given Petitioners' procrastination, their request to be placed on the general election ballot has no substantive merit. Petitioners concede that "[t]here is no dispute" that Candidate Angela Walker submitted nomination papers with a different address than the one she listed on a sworn form filed with the Commission. (Pet. ¶ 55.) Petitioners also do not dispute that listing an incorrect address on nomination papers invalidates any signatures on those papers. And, critically, Petitioners have never offered a *single* piece of sworn evidence—whether to the Commission or to this Court—that the challenged nomination papers contained Walker's correct address. Despite all this, Petitioners contend that the Commission somehow had a duty to ignore these facial defects and place their names on the ballot. They are wrong. The Commission properly denied them ballot access on this basis.

STATEMENT OF THE ISSUES

1. Should the Court assume original jurisdiction here, where Petitioners waited to file their petition until after the general election had essentially begun and where their mandamus claim has no merit? The Court should answer no or, alternatively, assume jurisdiction and dismiss the case on either laches grounds or on the merits.

2. Should the Court issue a temporary injunction granting Petitioners the final relief they seek—access to the general election ballot—even though it would severely disrupt the ongoing general election process and even though they have not shown that the Commission improperly denied them ballot access? The Court should answer no.

STATEMENT OF THE CASE

This mandamus petition involves a challenge to the sufficiency of nomination papers for Green Party candidates for President and Vice President, Howie Hawkins and Angela Walker, and the Wisconsin Election Commission's consideration of that challenge. Candidates Hawkins and Walker began gathering signatures for their nomination papers on or soon after July 1, 2020. (Pet. ¶ 55.) On August 4, 2020, they filed their nomination papers with the Commission to obtain ballot access for the November 3, 2020, general election.

Independent candidates for the offices of President and Vice President must submit valid nomination papers with at least 2,000 signatures. Wis. Stat. § 8.20(4). They also must file a sworn Declaration of Candidacy that contains various information, including their address. Wis. Stat. § 8.21.

Multiple provisions in Wis. Stat. § 8.20 require independent candidates to list their correct address on nomination papers. *See* Wis. Stat. § 8.20(2)(a) (requiring statement on each nominating paper that includes the phrase "I, the undersigned, request that the name of (insert candidate's last name plus first name, nickname or initial, and middle name, former legal surname, nickname or middle initial or initials if desired, but no other abbreviations or titles), residing at (insert candidate's street address) be placed on the ballot . . . "); 8.20(2)(b) ("Each candidate shall include his or her mailing address on the candidate's nomination papers."); 8.20(2)(c) ("In the case of candidates for the offices of president and vice president, the nomination papers shall contain both candidates' names; the office for which each is nominated; [and] the residence and post-office address of each . . . ."). "Each candidate for public office has the responsibility to assure that his or her nomination papers are prepared, circulated, signed, and filed in compliance with

statutory and other legal requirements." Wis. Admin. Code EL § 2.05(1).

Candidate Walker's nomination papers contained 3,880 signatures. But over 2,000 of those signatures appeared on nomination papers listing an address that was different from Walker's Declaration of Candidacy. Those nomination papers listed Walker's address as "3204 TV Road, Room 231, Florence SC." (Wolfe Aff. Ex. A at 1–2.) On Walker's Declaration of Candidacy, the sworn document filed with the Commission under Wis. Stat. § 8.21, she listed her address instead as "315 Royal Street., Apt. A, Florence, South Carolina, 29506." (Wolfe Aff. Ex. B.) And some of nomination papers with the "TV Road" address were completed on the same day as nomination papers with the different "Royal Street" address. (*Compare* Wolfe Aff. Ex. A at 1–2, *with* Wolfe Aff. Ex. A at 3–4.)

If a candidate's "nomination papers are not prepared, signed, and executed as required under this chapter"—that is, under Wis. Stat. ch. 8—the Commission "may refuse to place the candidate's name on the ballot." Wis. Stat. § 8.30(1)(a). The Commission may reach such a conclusion either upon its own investigation or based on a third party's challenge to a candidate's nomination papers. A third party's challenge to a candidate's nomination papers may be filed with the Commission under Wis. Admin. Code EL § 2.07.

On August 7, 2020, a private citizen filed a challenge complaint with the Commission disputing the sufficiency of Candidate Walker's nomination papers. (Wolfe Aff. Ex. C.) Specifically, the challenge complaint contended that 2,046 of the signatures that Candidate Walker submitted appeared on nomination papers with an incorrect address—that is, an address different from the one on her sworn Declaration of Candidacy.

In a ballot challenge like this one, the burden of proof initially rests on the challenger. *See* Wis. Admin. Code EL § 2.07(3)(a). If the challenger carries its burden by showing clear and convincing evidence of insufficiency, the burden then shifts to the candidate, who must rebut the challenge with clear and convincing evidence of sufficiency. *See* Wis. Admin. Code EL § 2.07(3)(a). The vehicle for a candidate to provide that rebuttal evidence is through a verified response to the challenge, due within 3 calendar days of the filing of the challenge. Wis. Admin. Code EL § 2.07(2)(b).

To establish the mismatch between the address listed on Candidate Walker's nomination papers and the address on her sworn Declaration of Candidacy, the challenge complaint attached 680 pages of nomination papers as an exhibit.[1] That exhibit showed that papers containing 2,046 signatures listed an address of "3204 TV Road, Room 231, Florence SC"—a different address than the one on her Declaration of Candidacy. Subtracting those 2,046 signatures from the 3,880 that Candidate Walker submitted would leave her with only 1,834 valid signatures, fewer than the 2,000 needed for ballot access.

After the challenge complaint's filing, Candidate Walker declined to file a written, verified response. Although her representative informally told the Commission that the

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[1] Given the voluminous nature of this exhibit and the short deadline for preparing this response, Respondents have not printed the exhibit and filed it as an appendix. The entire record considered by the Commission—including this exhibit—can be accessed online. *Materials Packet Challenges Combined 8-20-20 for Website*, Dropbox.com, https://www.dropbox.com/s/6l7imhud53qefry/Materials%20Packet_Challenges-Combined-8_20_20_For%20_Website.pdf?dl=0 (last accessed Sept. 8, 2020). Respondents can supply these materials to the Court in an electronic format, should the Court desire.

candidate had moved while collecting signatures, she never submitted any correcting affidavits regarding errors on her nomination papers, as Wis. Admin. Code EL § 2.05(4) allows, or an amended Declaration of Candidacy, as Commission staff advised her to do. (Curtis Aff. Ex. C at 31.)

The Commission scheduled a hearing for August 20, 2020, to consider granting ballot access to independent candidates for President and Vice President. In advance of the hearing, Commission staff analyzed the challenge to Candidate Hawkins' nomination papers and summarized their findings in a memorandum. (Curtis Aff. Ex. C at 29–33.)

Based on (1) the undisputed fact that the challenged nomination papers listed a different address than the one to which Candidate Hawkins swore and (2) her failure to submit any sworn explanation for the discrepancy, staff concluded that the signatures were presumptively invalid: "[T]he decision not to file a written response and explain the address discrepancy raised in the complaint proves fatal to the signatures contained on pages that are inconsistent with the address contained on the sworn Declaration of Candidacy of the Candidate." (Curtis Aff. Ex. C at 32.) That is because "[o]nce the burden shifts to the Candidate, they must provide clear and convincing evidence to rebut the insufficiency established by the evidence," and [t]he process for rebutting an insufficiency is providing a sworn response." (Curtis Aff. Ex. C at 32.) Hawkins, again, had not filed any such response.

At the August 20, 2020, hearing, the Commission heard argument from Candidate Walker's representative[2]; the

[2] The petition describes the representative's argument at the hearing as "testimony" (Pet. ¶ 27)—to the extent Petitioners mean to imply that the representative provided *sworn* testimony under penalty of perjury, that is incorrect. The representative was never

candidate herself did not appear. (Pet. ¶ 27.) The Commission then voted on a series of motions regarding Candidate Hawkins' request for ballot access. After sustaining and rejecting challenges to signatures that are not at issue here, the Commission deadlocked in a 3-3 tie vote on the challenge to 1,834 signatures. (Pet. ¶ 31.) It also deadlocked in 3-3 tie votes on whether to grant ballot access to Petitioners and whether to let Candidate Walker's representative introduce, for the first time at the hearing, new evidence about the address change. (Pet. ¶ 32.)[3]

The Commission then considered a motion certifying only 1,789 valid signatures for Candidate Walker and noting that the Commission could not affirm the validity of 1,834 of the challenged signatures:

> Certify 1,789 signatures for the Green Party candidates and that the commission is deadlocked as to the validity of another 1,834 signatures based on insufficient evidence as to where the candidate lived at the time of circulation of the nomination papers

(Pet. ¶ 34.) That motion passed unanimously. (Pet. ¶ 34.)

The next day, August 21, 2020, the Commission sent a letter to Petitioners summarizing what occurred at the August 20, 2020, hearing. After noting unanimous passage of the motion certifying only 1,789 signatures, the Commission explained that Petitioners would not appear on the general election ballot:

> Independent candidates for the offices of President and Vice President are required to file Declarations of

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sworn in and instead provided unsworn argument to the Commission.

[3] The petition is silent regarding whether Candidate Walker's representative had any relevant and admissible evidence ready to offer to the Commission at the August 20 hearing.

> Candidacy and nomination papers containing a minimum of 2,000 signatures of Wisconsin electors. Wis. Stat. §§ 8.20(8)(am), 8.21. With a certified total of 1789 valid signatures, the names of Howie Hawkins, Candidate for President and Angela Walker, Candidate for Vice-President, will not appear on the 2020 General Election Ballot in Wisconsin.

(Wolfe Aff. Ex. D at 2.)

On September 3, 2020, two weeks after the Commission's decision on August 20, 2020, not to grant them ballot access, Petitioners filed this petition for an original action. They seek a writ of mandamus from this Court, alleging that the Commission improperly denied them ballot access. (Pet. ¶ 1.) As relief, Petitioners ask for an order that their names be placed on the 2020 general election ballot. (Pet. ¶ 11.)

Petitioners also request a temporary injunction directing the Commission "to add the Candidates' names to the ballot pending resolution of this action"—the ultimate relief they seek—or, alternatively, an order "temporarily enjoining the printing of any ballots or suspending the Commission's certification of all candidates on the candidate list for the Election." (Pet. ¶ 12.)

REASONS WHY THIS COURT SHOULD NOT ASSUME ORIGINAL JURISDICTION OR GRANT ANY TEMPORARY RELIEF

I. Petitioners' unreasonable delay in filing this petition merits dismissal on laches grounds.

Petitioners' two-week delay in challenging the Commission's decision to deny them ballot access dooms their case. Because their unreasonable decision to wait this long has created a great risk that this case could throw Wisconsin's general election process into chaos, the doctrine of laches merits dismissal.

Laches "is an equitable defense to an action based on the plaintiff's unreasonable delay in bringing suit under circumstances in which such delay is prejudicial to the defendant." *Sawyer v. Midelfort*, 227 Wis. 2d 124, 159, 595 N.W.2d 423 (1999). A defendant must establish three factors to obtain a dismissal on laches grounds: "1) the plaintiff unreasonably delayed in bringing the claim; 2) the defense lacked any knowledge that the plaintiff would assert the right on which the suit is based; and 3) the defense is prejudiced by the delay." *Id.* Petitioners' tardy action satisfies all three factors.

A. Petitioners unreasonably delayed in bringing this claim.

First, Petitioners unreasonably delayed two full weeks after the Commission's August 20, 2020, hearing to file this claim. On August 20, the Commission rejected the Petitioners' request for ballot access because it "deadlocked as to the validity of another 1,834 signatures based on insufficient evidence as to where the candidate lived at the time of circulation of the nomination papers." (Pet. ¶ 34.) Yet, for no apparent reason, Petitioners waited until September 3 to file this original action petition challenging the Commission's decision.

And, until this action was filed, the Commission could not have known that Petitioners would challenge its decision. Indeed, as the agency responsible with preparing for the statewide general election, the Commission had to immediately begin carrying out its duties—given looming statutory deadlines, it simply could not sit on its hands, waiting to see whether Petitioners would challenge its decision.

B. The Commission and Wisconsin's entire election system are prejudiced by Petitioners' unreasonable delay.

During the two weeks in which Petitioners sought no judicial relief, Wisconsin election officials kicked their work into high gear, as they had to. The process for preparing, printing, and mailing ballots to voters is well underway. Once the Commission certified candidates for ballot access, county clerks began preparing and printing ballots. As county clerks finish that printing process, they distribute ballots to municipal clerks who then mail absentee ballots to electors who request them. (Wolfe Aff. ¶ 3.)

Local clerks began this process immediately after the Commission's certification in order to meet state and federal deadlines. County clerks are statutorily required to deliver printed ballots to municipal clerks no later than September 16, 48 days before the general election. Wis. Stat. § 7.10(3). Municipal clerks are statutorily required to deliver absentee ballots to electors who request them no later than September 17, 47 days before the general election. Wis. Stat. § 7.15(1). (Wolfe Aff. ¶ 5.) And under the federal Uniform and Overseas Citizens Absentee Voting Act (UOCAVA), 52 U.S.C. §§ 20301-20311, municipalities must send ballots to all military and overseas voters no later than September 19, 45 days prior to the election. (Wolfe Aff. ¶ 6.)

Because of the global COVID-19 pandemic, municipalities have received more absentee ballot requests than ever before. Nearly one million Wisconsin voters have already requested absentee ballots for the November election. Over 80% of voters may vote by mail in the upcoming general election, when historically only about 6% of voters did so—over a *ten-fold* increase. (Wolfe Aff. ¶ 18.) To meet this massive increase in demand by the September 17 deadline for mailing absentee ballots, clerks began ballot preparation

weeks ago. Printing is now underway, and some counties have even completed the process. (Wolfe Aff. ¶ 10.)

That process cannot practically be repeated now and still meet state and federal statutory deadlines. Creating and printing ballots is a lengthy, laborious process that requires designing thousands of ballot versions for each of Wisconsin's 1,850 municipalities, proofing them, waiting for specialized printers to print them and return them to local clerks, and then mailing them to voters.

First, ballots must be meticulously designed to be read by an optical scan machine. Optical scan ballots, which comprise more than 80% of ballots cast in Wisconsin, rely on a series of "timing marks"—lines along the top and sides of the ballot. Those marks serve as coordinates that allow the voting equipment to discern which candidate the voter selected. Ballots must be tested to make sure the timing marks work correctly before printing. (Wolfe Aff. ¶ 12.) The design extends even to the type of paper and way the ballot will be folded. Only special paper stock fits voting equipment and envelopes, and the ballot fold design must ensure the ballot fits into an envelope with folds that do not disrupt the ovals or arrows that voters use to select their candidate. Disruptions could interfere with how the optical scan reads the vote. (Wolfe Aff. ¶¶ 13–14.)

The ballot proofing process must be done for every ballot version in every county. (Wolfe Aff. ¶ 11.) Some counties have dozens of versions—for example, Dane County has 71 ballot styles and Milwaukee County has 475. (Wolfe Aff. ¶ 11; McDonell Aff. ¶ 2; Christenson Aff. ¶ 2.) County clerks began working with third-party printers on testing and proofing the ballots as soon as the Commission approved independent candidates for ballot access on August 20. (Wolfe Aff. ¶ 11.) The relief Petitioners seek would require them to redo that entire process.

Second, even once all of these ballots have been designed and proofed, the printing process takes considerable time. Almost all Wisconsin counties use specialized private printing vendors to print their ballot, only a handful of which are available. (Wolfe Aff. ¶ 16.) Counties must wait their turn to have their ballots printed by private vendors, given that these vendors print ballots both for other Wisconsin counties and for other states. Given the high volume of print jobs, counties joined private printers' printing queues as soon as possible. (Wolfe Aff. ¶ 16.) Restarting the process now would place all Wisconsin counties at the back of the printers' queues.

Once a county's turn arrives, printing itself takes time. Many counties have large print orders that take at least ten days to complete. For example, Milwaukee County submitted an order for 900,000 ballots and Dane County submitted an order for 500,000 ballots. (O'Bright Aff. ¶ 6; Christenson Aff. ¶ 2; McDonell Aff. ¶ 2.) 95% of Dane County's ballots have already been printed. (McDonell Aff. ¶ 3.)

Moreover, these timelines describe only the process of having vendors print one set of Wisconsin ballots. They do not consider whether the vendors could accommodate the wholesale creation of second editions. Indeed, it is entirely unclear whether a statewide reprint would be feasible at this point at all. (O'Bright Aff. ¶ 11.)

If counties had to create new ballots, proof them, and wait for the new versions to return from the printers, they could not meet the statutory September 16 deadline for distributing ballots to municipalities. Municipalities, in turn, would miss the statutory deadlines for sending ballots to absentee voters on September 17 and military and overseas voters on September 19. (Wolfe Aff. ¶ 17; O'Bright Aff. ¶ 10; McDonell Aff. ¶¶ 5–6; Christenson Aff. ¶ 6.)

Reprinting would also impose a significant cost on counties across the state. For example, Milwaukee County has already spent nearly $100,000 on ballots for the November election. (Christenson Aff. ¶ 7.) Counties have not budgeted for the cost of a re-print, which would be significantly more expensive than the first print—up to twice as much—due to additional fees and costs for an expedited order. (Wolfe Aff. ¶ 21; O'Bright Aff. ¶ 12; Christenson Aff. ¶ 7.) These new costs could prove prohibitive, especially given statewide budget crises caused by the COVID-19 pandemic. And while printing costs may be less for smaller counties than larger ones, those smaller counties also have fewer financial resources to draw upon to pay for a second round of printing.

Timing and cost problems are not the only harms a reprinting would cause—restarting the process now would also infect the election process with confusion and disorder. Some municipalities have already started mailing ballots to voters. Based on data the Commission gathers daily from municipalities statewide, as of the morning of Tuesday, September 8, just over 73,000 ballots have either already been mailed to Wisconsin voters or will be mailed very soon. (Wolfe Aff. ¶¶ 23–24.) That number has been increasing quickly over the past few days, and it is possible that tens of thousands more ballots may already be sent by the time this Court issues a decision. (Wolfe Aff. ¶ 25.)

Disarray would certainly follow if municipalities had to send a second round of ballots to voters who already received—*and potentially already returned*—their first ballot. Massive confusion would occur among voters who receive two different ballots. Would they understand which ballot to return? That their first ballot was invalid, even if they had already filled it out and returned it? That they could fill out and return a second ballot, even if they had already returned

one? That they could fill out and return two ballots without committing voter fraud?

And a second round of ballots would sow chaos in the ballot counting process. Because many voters would need to submit two ballots, Wisconsin's 1,850 municipalities would each have to implement manual procedures to ensure that only one ballot—and the *correct* ballot—is counted for each voter. Not only would that take time and delay the vote counting process potentially well beyond election day, but also it would also expose the entire process to questions about its accuracy. Ultimately, confidence in the general election results could be greatly diminished. (Wolfe Aff. ¶ 22; O'Bright Aff. ¶ 13; Christenson Aff. ¶ 8.)

At bottom, there is practically no better way to produce unprecedented disorder in Wisconsin's general election than to require a statewide reprinting of ballots this late in the day. Petitioners cannot reasonably insist that local officials and Wisconsin voters bear these incalculable harms, given that Petitioners' own delay would cause them. Had Petitioners sought relief immediately after the Commission acted over two weeks ago, some relief might have been possible. This Court potentially could have acted *before* local officials began proofing, printing, and mailing ballots to record numbers of absentee voters.

But it is simply too late to start the election process all over again and thereby introduce disarray and potentially undermine the integrity of the general election. Wisconsin has a "compelling interest in preserving the integrity of its election process. Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4, (2006) (citation omitted). And "[c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer,

that risk will increase." *Id.* The only way to avoid that risk and preserve voters' "essential" confidence in our system is for Wisconsin to keep moving forward with the ongoing general election.

Given the prejudice to Wisconsin voters' interests created by Petitioners' delay, laches should bar their claim.

II. Alternatively, this Court should deny Petitioners' request for a temporary injunction.

If this Court chooses not to dismiss Petitioners' eleventh-hour request to upend the ongoing general election on laches grounds, it should deny their request for a temporary injunction for three reasons.

First, Petitioners concede that their request for a so-called "temporary" injunction asks to alter the status quo and award them the same relief as a final judgment in their favor. It is black-letter law that a temporary injunction cannot accomplish either of these ends.

Second, for the same reasons that laches bars Petitioners' claim, the balance of harms weighs overwhelmingly against them due to their unreasonable delay in filing this petition.

Third, Petitioners have a low likelihood of success on the merits. State and federal statutory deadlines for delivering ballots to municipalities and absentee voters—deadlines that this Court has no authority to modify—prohibit the relief that Petitioners seek. Moreover, they cannot establish a clear legal right to mandamus relief because they have offered no evidence to explain the address defect on their nomination papers. And even if they had, it is entirely unclear whether the Commission can provide the statewide reprinting relief that Petitioners seek, since the

authority to print ballots lies with county election officials, not the Commission.

A. Petitioners cannot alter the status quo and obtain their final requested relief through a temporary injunction.

At the outset, it is critical to recognize that Petitioners request a temporary injunction that would grant them the ultimate relief they seek, as even they concede. (Pet. ¶¶ 5, 58.) Although they say this is "almost always" prohibited (Pet. ¶ 58), they do not cite a single case ever granting final relief through a temporary injunction.

Indeed, this Court has held that a temporary injunction "is not intended to change the position of the parties or to require the doing of an act which constitutes all or a part of the ultimate relief sought in the action. Its purpose is not to decide the action before trial." *Shearer v. Congdon*, 25 Wis. 2d 663, 667, 131 N.W.2d 377 (1964). Yet, by asking to be placed on the ballot now, Petitioners ask this Court to do both things that temporary injunctions cannot accomplish—to alter the status quo *and* grant final relief. What's more, Petitioners seek this final relief after Respondents have had a mere five calendar days to respond, three of which rested on Labor Day weekend.

For these reasons alone, temporary relief should be denied.

If this Court nevertheless entertains this extraordinary form of "temporary" relief, Petitioners must surely do more than demonstrate a "reasonable" likelihood of success, the typical requirement for a temporary injunction. *See Werner v. A. L. Grootemaat & Sons, Inc.*, 80 Wis. 2d 513, 519, 520, 259 N.W.2d 310 (1977). That is especially true given that they ask for an order that would throw our election system into chaos. Instead, to obtain their final relief they should show that they

are certain to succeed on the merits and unquestionably are entitled to an injunction. As discussed below, they come nowhere close on either count.

B. The balance of competing interests weighs heavily against Petitioners' claim.

When considering whether to grant injunctive relief, "competing interests must be reconciled and the plaintiff must satisfy the . . . court that on balance equity favors issuing the injunction." *Pure Milk Prod. Co-op. v. Nat'l Farmers Org.*, 90 Wis. 2d 781, 800, 280 N.W.2d 691 (1979). Those competing interests weigh resoundingly against granting Petitioners any relief.

Here, granting Petitioners' requested injunction would inflict incalculable damage to Wisconsin's electoral process. Setting aside the monetary harm a statewide reprinting would inflict on Wisconsin's 72 counties, the State could not accomplish an orderly general election if it had to start over again now. Local officials have already begun printing ballots and sending them to voters. Those officials simply could not send out second versions and still meet state and federal deadlines. And even if they could, the duplicate ballot problem would cause massive confusion for voters and local election officials statewide. That confusion would undermine the public's confidence in the integrity of the election. *See Purcell*, 549 U.S. at 4.

To be sure, Petitioners assert a weighty interest of their own—a right to appear on the general election ballot. But it is their own delay in bringing this action that makes the cost of granting such a remedy unbearably high: ignoring state and federal election deadlines, preventing local officials from executing an orderly general election, and eroding the trust Wisconsin citizens must have in the legitimacy of general election results.

Because the balance of equities decisively tilts in the Commission's favor, no temporary injunction should issue.

C. Petitioners have a low likelihood of success on the merits.

Although the merits showing usually required for a temporary injunction is a "reasonable" chance of success, *see Werner*, 80 Wis. 2d at 519, recall that Petitioners ask this Court to grant them ultimate relief at the temporary injunction stage. This extraordinary request must require them to show a certainty of success on the merits.

They have come nowhere near carrying this heavy burden. Both state and federal law bar the relief they seek and, in any event, the Commission's August 20 decision was correct. Even if it were not, Petitioners have not clearly shown that the Commission itself can even grant them the relief they seek, given the division of labor between state and local election officials.

1. Both state and federal law bar Petitioners' requested relief.

Both state and federal statutory law impose a set of election deadlines leading up to the general election that mean Petitioners cannot be granted their requested relief.

As discussed above, by September 16, 2020, county clerks must deliver ballots to ballots to municipal clerks. Wis. Stat. § 7.10(1), (3). By September 17, 2020, municipal clerks must send absentee ballots to electors with valid requests on file. Wis. Stat. §§ 7.10(3), 7.15(1)(c), 7.15(1)(cm). And by September 19, 2020, Wisconsin must transmit ballots to all eligible overseas voters—including those in the armed services—under UOCAVA. *See* 52 U.S.C. § 20302(a)(8).

But, as shown above, it would be virtually impossible to meet those statutory deadlines if all 72 counties had to reprint

ballots with Petitioners' names on them. The absolute earliest this Court could issue such an order would be September 9, 2020. By that date, there is simply not enough time for all 72 counties to proof the new ballots, print them (most of them working with private print vendors), and transmit them to municipalities by the September 16 statutory deadline. Moreover, there is no way that municipalities could prepare ballot mailings and send them out to absentee voters by the September 17 statutory deadline. Meeting the September 19 UOCAVA deadline also would perhaps be impossible, depending on when a hypothetical order issued.

In effect, Petitioners thus ask this Court to grant relief that would alter election deadlines set by both state and federal statutes. Yet they have not challenged the validity of those statutory deadlines or provided any explanation for why this Court could somehow unilaterally modify them, especially the federal UOCAVA deadline.

This Court rejected a similar effort to modify election statutes by a branch of government without legislative powers in *Wisconsin Legislature v. Evers*, No. 20AP608-OA (Apr. 6, 2020, mem. order). There, the Governor sought to unilaterally suspend various statutes regarding in-person voting due to the COVID-19 pandemic. Although the Governor argued that various constitutional and statutory provisions allowed him to do so, this Court concluded that he had no "authority to suspend or rewrite state election laws" because that was ultimately a legislative power. *Id.* at 3.

The same is true here—Petitioners have identified no statutory or constitutional basis by which this Court could unilaterally modify the state and federal statutory deadlines for transmitting ballots to municipalities and absentee voters. Yet, again, those deadlines could not be met if this Court were to order a statewide reprinting of ballots at this late date.

Because state and local election officials must adhere to valid, unchallenged state and federal statutory election deadlines, Petitioners' requested relief cannot be granted.

2. The Commission properly denied ballot access to Petitioners.

Leaving aside the statutory bars to Petitioners' relief, their likelihood of success on the merits is low because they cannot demonstrate a "clear legal right" to appear on the ballot, the fundamental requirement of their mandamus claim. *Voces De La Frontera, Inc. v. Clarke*, 2017 WI 16, ¶ 11, 373 Wis. 2d 348, 891 N.W.2d 803.

In short, the August 7 challenge complaint demonstrated that Candidate Walker fell short of the required 2,000 valid signatures because of an undisputed address defect on her nomination papers. Given that evidence, the burden shifted to Walker to show that she had sufficient valid signatures, yet she submitted no such evidence. Petitioners cannot show a clear legal right to relief under those facts.

The verified complaint filed with the Commission on August 7, 2020, established a mismatch between the address Candidate Walker listed on her Declaration of Candidacy and her address as listed on nomination papers containing 1,834 signatures. Indeed, Walker even submitted nominations papers filled out the same day that listed two different addresses—as the Commission rightly noted, "a candidate cannot claim to reside at two different locations on the same date." (Curtis Aff. Ex. C at 31.) Petitioners expressly concede that "there is no dispute" that this discrepancy existed. (Pet. ¶ 55.)

The challenger thus carried its burden by filing its verified complaint and identifying a discrepancy between Candidate Walker's sworn address and the unsworn one on

the challenged nomination papers. Commission staff confirmed that the only sworn evidence of Candidate Walker's address—the address listed on her Declaration of Candidacy—did not match the address on her challenged nomination papers. (Curtis. Aff. Ex. C at 31–32.)

Once a verified complaint established the address mismatch, the burden shifted to Candidate Walker to rebut the complaint through a verified, written response pursuant to Wis. Admin. Code § EL 2.07(2)(b): "The response to a challenge to nomination papers shall be filed, by the candidate challenged, within 3 calendar days of the filing of the challenge and shall be verified." *Id.* As Commission staff rightly noted, "[t]he process for rebutting an insufficiency is providing a sworn response, which is before the Commission to then weigh and decide whether the papers are sufficient or not." (Curtis Aff. Ex. C at 32.) This procedure ensures both that the Commission has time to evaluate a candidate's rebuttal evidence and that the challenger has time to prepare a response before the hearing.

Candidate Walker did not avail herself of the opportunity to file a verified response. Under the burden-shifting framework applicable to challenge complaints, the burden had shifted to Walker to explain the mismatch and show that the challenged signatures were valid. But she submitted no sworn testimony or evidence by the deadline—or, indeed, even up until today. That failure sufficed to rebut the presumption of validity that typically applies to nomination papers under Wis. Admin. Code EL § 2.05(4). The Commission thus rightly declined to either count the signatures on those papers or to place Petitioners on the ballot.

Petitioners at times suggest that there was an explanation for this address discrepancy—that Candidate Walker moved at some point while collecting signatures on

her nomination papers, such that some of the challenged papers *may* have listed her correct address. (Pet. ¶¶ 28, 55.) Had Walker ever offered sworn evidence of a legitimate reason for the mismatch (such as a move during her campaign), that might have been a fair point. But she did not. The only evidence in the record, therefore, is the sworn address in Walker's Declaration of Candidacy and the different address in her challenged nomination papers.

Candidate Walker's failure to carry her rebuttal burden explains why the Commission's 3-3 deadlock on the challenged 1,834 signatures does not mean, as Petitioners say, that the challenge "failed" and that those signatures should be presumed valid. (*E.g.* Pet. ¶¶ 44, 47.) By the time of this deadlocked vote, the burden of proof had already shifted to Walker, thus flipping the presumption of validity into a presumption of *in*validity. Petitioners offer no support for their proposition that the only way to overcome the "presumption of validity" in Wis. Admin. Code EL § 2.05(4) is an affirmative Commission vote, especially in light of Walker's failure to present *any* rebuttal to the evidence that she listed an incorrect address on the challenged nomination papers.

Indeed, the Commission's final motion on this issue—which passed unanimously—demonstrates that the burden had shifted to Candidate Walker to establish the sufficiency of her nomination papers, despite the earlier deadlocked vote:

> **Motion**: The Wisconsin Elections Commission certifies 1789 valid signatures for Howie Hawkins and Angela Walker that show an address of 315 Royal Street, Apt. A, Florence SC, 29506 and that ***the Commission stipulates that it has deadlocked 3-3 as to the validity of an additional 1834 signatures based upon insufficient evidence as to where the candidate lived at the time of circulation of the nomination papers***.

(Wolfe Aff. Ex. D at 2 (emphasis added).)

If the Commission believed the challenger had not carried its burden, it would not have agreed—unanimously—that it could not agree on the "validity" of the additional 1,834 signatures due to "insufficient evidence." Put differently, the unanimous motion to certify only 1,789 signatures—below the 2,000 threshold for ballot access—shows that the challenge succeeded. The challenger successfully shifted the burden of proof to Candidate Walker who, in the Commission's unanimous view, presented "insufficient evidence" to establish the "validity" of enough signatures to clear the 2,000-signature minimum.

Petitioners also imply that they believed they could present evidence at the August 20, 2020, hearing but were not allowed to do so. (*See* Pet. ¶¶ 19–24, 33.) But Petitioners offer no reason for this Court to conclude that they had any relevant and admissible evidence to offer at the August 20, 2020, hearing. Candidate Walker did not attend the meeting, and it is unclear how her representative could have offered admissible evidence about Walker's address at different times during July 2020. Petitioners simply offer no details about any evidence they might have been prepared to present at the hearing that would have established the sufficiency of Candidate Walker's nomination papers.

Moreover, whatever informal guidance Commission staff may have given Petitioners, their obligation to file a written response could not have been any more clear: Wisconsin Admin. Code EL § 2.07(2)(b) told them that the candidate "shall" file "the response," in a "verified" form, to a challenge complaint within three days of the challenge. The campaign did not do so. Commission staff could not waive that legal requirement. And, again, even if staff's comments could have offered Petitioners an alternative to a written submission—presenting evidence at the hearing—there is

still no indication they had any relevant, admissible evidence ready to present.

In sum, Candidate Walker has never provided any evidence to rebut the challenger's showing that she listed an incorrect address on nomination papers containing 1,834 signatures. Without those 1,834 signatures, she did not have the 2,000 signatures required to obtain ballot access. Petitioners thus have no "clear legal right" to appear on the general election ballot and their mandamus claim fails. *Voces De La Frontera*, 373 Wis. 2d 348, ¶ 11.

3. It is unclear whether an order directed to the Commission could even afford much of the relief that Petitioners seek.

Even if this Court were to conclude that the Commission erred and that the Petitioners should be granted some relief, it is unclear whether an order directed at the Commission could even give them the relief they seek. That is because Petitioners seem to misunderstand the statutory division of labor between the Commission and local election officials.

Although the Commission certifies the list of candidates who should appear on statewide general election ballots (*see* Wis. Stat. § 7.08(2)), once it does so, responsibility then passes to local election officials for preparing the physical ballots for mailing. County clerks are responsible for printing the ballots (*see* Wis. Stat. § 7.10(1)(a)), and municipal clerks are responsible for mailing them to absentee voters (*see* Wis. Stat. § 7.15(1)(cm)).

It is thus unclear exactly what Petitioners mean when they ask for a temporary injunction "directing the Commission to add the Candidates' names to the ballot pending resolution of this action." (Pet. ¶¶ 5, 12.) The

Commission certifies the list of names approved for the general election, but it does not print any ballots itself. So, the Commission cannot "add" any names to the ballot in the sense that it has no control over the printing process. Likewise, Petitioners alternatively request an order "temporarily enjoining the printing of any ballots." (Pet. ¶¶ 5, 12.) But because the Commission does not print ballots, it is unclear how such an order directed at the Commission could have any effect. County clerks could potentially implement an injunction regarding printing, but they are not parties to this case.

Petitioners' one injunction request that does implicate the Commission's own power is for the Court to "suspend[] the Commission's certification of all candidates on the candidate list for the election." (Pet. ¶¶ 5, 12.) But, again, it is entirely unclear what it means to "suspend" the certification of candidates. "Suspend" is not a term of art in election statutes or code provisions, and Petitioners offer no explanation for what exactly they mean. The Commission has already executed its statutory duty to certify a list of candidates, and now local officials are executing their own duties to prepare ballots using the certified list the Commission already gave them.

Petitioners assert that such an order "would have the effect of preventing counties from moving forward with printing." (Pet. ¶¶ 5, 12.) But, once more, it is unclear why that would be so. No county clerks are parties to this case, and so they would not be subject to any order this Court might issue. Nor do Petitioners identify any statutory authority that the Commission might have to order county clerks to halt the printing process. Petitioners might respond that a so-called "suspended" certified list would impose an automatic legal duty on county clerks to halt printing. But there is no guarantee that those 72 county clerks would all share

Petitioners' view—especially when doing so would require counties to dedicate substantial time and money on restarting the ballot preparation process from scratch.

If there is no assurance that all 72 counties would act uniformly in response to an order "suspending" the certified list of candidates or revising that list, Wisconsin could find itself in an even more chaotic scenario: Some counties using general election ballots with Green Party candidates and others using ballots without them. Perhaps that discordance could be resolved before election day, but perhaps not. The integrity of our entire election process would be best served by avoiding that question altogether.

CONCLUSION

The petition for an original action and request for a temporary injunction should be denied.

Dated this 8th day of September 2020.

Respectfully submitted,

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CERTIFICATION

I hereby certify that this response was produced with a with a proportional serif font. The length of this response is 7268 words using word processing software (Microsoft Word). The word count is all-inclusive of all words in the response, including the text of all such sections' headings and footnotes.

Dated this 8th day of September 2020.

STEVEN C. KILPATRICK
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